T Mohan a/l Ellen & Ors v Pentadbir Tanah Daerah Petaling

HIGH COURT (SHAH ALAM) — ORIGINATING MOTION NO MT2-25-6 OF 1999
ABU SAMAH J
25 JUNE 1999

Administrative Law *— Remedies — Certiorari — Application to quash decision of land administrator to evict squatters — Squatters granted extension of eviction notice — Whether subsequent decision to evict was unreasonable and irrational — Whether treatment of squatters was discriminatory — Alternative remedy of appeal by virtue of National Land Code 1965 s 418 — Whether certiorari should be granted*

The applicants were squatters on the state lands. They had been residing illegally and without permission on the state lands with some other squatters for the past 40 years. In February 1997, the respondent issued eviction notices to them to vacate their houses within 14 days. On 13 January 1999, the respondent issued fresh eviction notices to all the squatters to vacate the state lands within 14 days of the date of the notices. On 22 January 1999, a meeting was held between the respondent and the applicants at the request of the latter. As a result of this meeting, the respondent promised not to take any further action pending the next meeting. The next meeting was on 5 February 1999. The applicants requested for a deferment of the enforcement of the eviction notices. The respondent agreed to defer any further action until 5 March 1999. The decision was contained in a letter dated 8 February 1999 ('the letter'). The applicants then filed an application for an order of certiorari to quash the respondent's decision contained in the letter to demolish their house or evict them from their houses after 5 March 1999. The application to quash the decision of the respondent as being null and void was based on the grounds of unreasonableness, discrimination and locus standi. It was submitted that the respondent's decision was unreasonable and irrational because the decision was only directed at them and not to all the squatters. It was contended that the letter was vague and unclear. It was further contended that the company to whom the lands were approved for alienation ('TISB') but had defaulted in payment to quit rents and premiums and the developer ('MHDB') who had constructed the longhouses on the lands were also trespassers and they should also be issued with eviction notices and treated similarly and not differently or favourably. Such discrimination violates art 8(1) of the Federal Constitution. On the issue of locus standi, it was submitted that the respondent had no locus standi to make the impugned decision as the lands had been alienated to TISB.

Held, dismissing the application:

(1) The respondent's letter was clear and unambiguous. The applicants could not be misled by it. The word 'sahaja' in the

letter means that the extension was given to them alone and not to other squatters. They requested for the postponement and they got what they wanted. The letter did not state anywhere that the other squatters need not have to vacate their lands or that their houses would not be demolished. The respondent's decision to defer enforcement of the eviction notices made in favour of the applicants, arising directly from their own request, could not be said as irrational and unreasonable (see pp 440H–I, 441A).

(2) On the facts before the court, there was no discrimination within the meaning of art 8(1) of the Constitution. The applicants and the other squatters were treated similarly and not differently. In fact they were better treated compared to other squatters. The respondent had been fair to the applicants. He heard them and acceded to their request for an extension of time. As far as TISB and MHDB were concerned, they could not be labelled as squatters and be put in the same class as the applicants. Nor were they trespassers. The longhouses were constructed with the knowledge and permission of the state authority (see pp 441H–442A).

(3) The lands remain state lands as no titles had been issued to TISB. At all material times, the lands had not been registered in the name of TISB. Section 78(3) of the National Land Code 1965 makes it clear that the alienation of state lands shall take effect upon the registration of a register document of title and not withstanding that its alienation had been approved by the state authority, the land shall remain state land until that time (see p 442D–E).

(4) An order of certiorari is not normally issued where the applicants have an alternative remedy save only in very exceptional circumstances. In the instant case, the applicants have a right of appeal against the decision of the respondent if they were aggrieved by the state decision by virtue of s 418 of the National Land Code. The court found that on the facts of this case, there were no really exceptional circumstances to justify the court in exercise of its discretion to grant an order of certiorari to quash the respondent's decision (see pp 443G, I, 446F).

[Bahasa Malaysia summary

Pemohon-pemohon merupakan setinggan yang menduduki tanah negeri. Mereka telah menetap atas tanah negeri menyalahi undang-undang dan tanpa kebenaran dengan setinggan lain selama 40 tahun. Pada bulan Februari 1997, responden telah mengeluarkan notis pindah keluar kepada mereka supaya mengosongkan rumah dalam tempoh 14 hari. Pada 13 Januari 1999, responden mengeluarkan notis pindah keluar yang baru kepada semua setinggan supaya mengosongkan tanah dalam tempoh 14 hari dari tarikh notis tersebut.

Pada 22 Januari 1999, suatu mesyuarat telah diadakan di antara responden dan pemohon-pemohon atas permintaan pemohon-pemohon. Akibat mesyuarat ini, responden berjanji untuk tidak mengambil apa-apa tindakan lanjut sehingga mesyuarat yang berikutnya. Mesyuarat seterusnya diadakan pada 5 Februari 1999. Pemohon-pemohon memohon supaya penguatkuasaan notis pindah keluar ditangguhkan. Pennentang bersetuju untuk menangguhkan sebarang tindakan lanjut sehingga 5 Mac 1999. Keputusan tersebut termaktub dalam sepucuk surat bertarikh 8 Februari 1999 ('surat tersebut'). Pemohon-pemohon kemudiannya memfailkan permohonan untuk perintah certiorari bagi membatalkan keputusan responden yang termaktub dalam surat tersebut supaya meruntuhkan rumah mereka atau memaksa mereka pindah keluar dari rumah mereka selepas 5 Mac 1999. Permohonan untuk membatalkan keputusan responden sebagai tak sah dan terbatal adalah berasaskan alasan-alasan ketidakmunasabahan, diskriminasi dan locus standi. Adalah dihujahkan bahawa responden bertindak secara tidak munasabah dan tidak rasional kerana keputusan tersebut hanya berkaitan dengan mereka dan bukan semua setinggan. Adalah dihujahkan bahawa surat tersebut tidak jelas. Seterusnya dihujahkan bahawa syarikat yang mana tanah tersebut telah diluluskan untuk pemberimilikan ('TISB') tetapi telah ingkar dalam bayaran cukai keluar dan premium dan pemaju ('MHDB') yang telah mendirikan rumah panjang atas tanah tersebut adalah penceroboh dan mereka seharusnya dikeluarkan notis keluar dan dilayan dalam cara yang sama dan bukan cara yang sebaliknya. Diskriminasi sedemikian melanggar perkara 8(1) Perlembagaan Persekutuan. Mengenai isu locus standi, dihujahkan bahawa responden tidak mempunyai locus standi untuk membuat keputusan yang dipersoalkan kerana tanah tersebut telah diberimilik kepada TISB.

Diputuskan, menolak permohonan tersebut:

(1) Surat responden adalah jelas dan tanpa sebarang keraguan. Pemohon-pemohon tidak mungkin telah terpedaya olehnya. Perkataan 'sahaja' dalam surat tersebut bermaksud bahawa perlanjutan diberikan kepada mereka sendiri dan bukan kepada setinggan lain. Mereka telah meminta tundaan dan telah mendapatkannya. Tiada apa-apa dalam surat tersebut yang menyatakan bahawa setinggan lain tidak perlu mengosongkan rumah mereka atau bahawa rumah mereka tidak akan diruntuhkan. Keputusan responden untuk menangguhkan penguatkuasaan notis pindah keluar yang dibuat memihak kepada pemohon-pemohon, yang berbangkit secara langsung atas permintaan mereka, tidak boleh dikatakan tak rasional dan tidak munasabah (lihat ms 440H–I, 441A).

(2) Atas fakta-fakta di hadapan mahkamah, tidak terdapat apa-apa diskriminasi dalam maksud perkara 8(1) Perlembagaan tersebut.

Pemohon-pemohon dan setinggan lain telah menerima layanan yang sama dan bukan yang berbeza. Pada hakikatnya, mereka telah menerima layanan yang lebih baik berbanding dengan setinggan lain. Responden telah bertindak adil terhadap pemohon-pemohon. Beliau telah mendengar mereka dan menurut permohonan mereka untuk perlanjutan masa. Sejauh mana TISB dan MHDB adalah berkaitan, mereka tidak boleh digelar setinggan dan dikelaskan dalam kumpulan yang sama dengan pemohon-pemohon. Mereka tidak juga merupakan penceroboh. Rumah panjang tersebut telah didirikan dengan pengetahuan dan kebenaran pihak berkuasa negeri (lihat ms 441H–442A).

(3) Tanah tersebut kekal sebagai tanah negeri disebabkan tiada hakmilik telah dikeluarkan kepada TISB. Pada semua masa material, tanah tersebut tidak didaftarkan dalam nama TISB. Seksyen 78(3) Kanun Tanah Negara 1965 menetapkan bahawa pemberimilikan tanah negeri berkuatkuasa atas pendaftaran dokumen hakmilik daftar dan tanpa mengira bahawa pemberimilikannya telah diluluskan oleh pihak berkuasa negeri, tanah tersebut tetap kekal sebagai tanah negeri sehingga masa itu (lihat ms 442D–E)).

(4) Perintah certiorari biasanya tidak dikeluarkan di mana pemohon-pemohon mempunyai remedi alternatif melainkan dalam keadaan istimewa. Dalam kes ini, pemohon-pemohon mempunyai hak rayuan terhadap keputusan responden sekiranya mereka terjejas oleh keputusan negeri disebabkan s 418 Kanun Tanah Negara. Mahkamah mendapati bahawa atas fakta kes ini, tiada apa-apa keadaan yang istimewa untuk menjustifikasikan mahkamah melaksanakan kuasa budi bicaranya untuk memberikan perintah certiorari bagi membatalkan keputusan responden (lihat ms 443G, I, 446F).]

Notes

For cases on certiorari generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 135–306.

Cases referred to

Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241 (refd)

Cheah Foong Chiew v Lembaga Jurutera Malaysia [1999] 3 MLJ 110 (refd)

Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155 (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185 (refd)

Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & Ors/Lesco Development Corp Sdn Bhd v Yap Chong Lan & Ors [1984] 2 MLJ 123 (refd)

Kuluwante (an infant) v Government of Malaysia & Anor [1978] 1 MLJ 92 (refd)

Lim Kui Siam & Anor (representing member of Persatuan Penduduk-Penduduk Kawasan Hj Manan, Kluang) lwn Pentadbir Tanah Daerah Kluang [1995] 1 CLJ 846 (refd)

Low See Kim, Re [1988] 3 MLJ 110 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sg Gelugor Dengan Tanggungan [1999] 3 MLJ 1 (refd)

Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41 (refd)

PP v Khong Teng Khen & Anor [1976] 2 MLJ 166 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Sidek bin Hj Muhamad & Ors v Government of the State of Perak [1982] 1 MLJ 313 (refd)

Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor and another appeal [1998] 2 MLJ 289 (refd)

Legislation referred to

Federal Constitution arts 8(1)
Immigration Act ss 14(5), 59A
National Land Code ss 15(1)(a), (g), 48, 78(3), 418, 425, 426A
Rules of the High Court 1980 O 53 r 1(2), (5)

Selva Balan (*Susan Joseph* with him) (*Azman, Joseph & Associates*) for the applicant.

Mohd Zawawi bin Hj Salleh (*Nik Suhaimi bin Nik Sulaiman*) (State Legal Advisor's Office Selangor) for the respondent.

Cur Adv Vult

Abu Samah J: This was an application by the applicants by way of a notice of originating motion for an order of certiorari to quash the respondent's decision on 5 February 1999 to demolish their houses or evict them from their houses or premises, built on state lands in Kampung Sungai Nipah, Batu Tiga Shah Alam, after 5 March 1999 pursuant to the eviction notices served on them. The eviction notices required them to vacate the state lands which they had been staying illegally and without permission, within 14 days of the date of the notices. It was not an application to quash the said notices. The original respondent was 'Pejabat Tanah/Daerah Petaling' but it was orally amended at the hearing before me to 'Pentadbir Tanah Daerah Petaling' after my query as to why the applicants cited the respondent as the 'Pejabat Tanah/Daerah Petaling'. The learned state legal advisor, who appeared for the respondent, after some hesitation, did not object to the oral application for amendment.

The respondent's decision was contained in a letter dated 8 February 1999 addressed to the first applicant as the chairman of the action committee of Kampung Sg Nipah ('KSN'). To avoid any misapprehension of facts, it had to be stated here that he was only acting as chairman of the action committee on behalf of the applicants and not on behalf of all the squatters in KSN. The letter reads as follows:

Pejabat Daerah/Tanah Petaling
Kompleks Pejabat Kerajaan Daerah Petaling
No 9 Jalan SS 16/1
47500 Subang Jaya
Selangor Darul Ehsan

Ruj Tuan:
Ruj Kami: (179) dlm PTDP 3A(DM) 63
Tarikh: 8 Februari 1999

Encik T Mohan
Pengerusi
Jawatankuasa Bertindak
Kampong Sungai Nipah
C10 112 Block 65, Ground Floor
Seksyen 24, 40000 Shah Alam
Selangor

Tuan,

Penangguhan Tindakan Penguatkuasaan Setinggan Sungai Nipah yang di Wakili oleh Tuan

Adalah saya dengan hormatnya merujuk kepada perkara tersebut di atas.

2 Mesyuarat yang diadakan pada 5 Februari 1999 di pejabat Daerah Petaling yang dipengerusi oleh Pegawai Daerah Petaling telah bersetuju untuk menangguhkan tindakan meroboh/mengosongkan rumah/ bangunan setinggan yang tuan wakili sahaja untuk tempoh satu bulan iaitu sehingga pada 5 Mac 1999.

3 Sehubung dengan itu tindakan penguatkuasaan akan dijalankan selepas tarikh tersebut tanpa sebarang notis.

Sekian terima kasih.

'Berkhidmat Untuk Negara'
Saya yang menurut perintah

tt
(AB Malek bin Hj Mohd Amin)
Penolong Pentadbir Tanah (Penguatkuasaan)
bp Pentadbir Tanah Petaling

sk

1 YB Tuan Lee Hwa Beng
ADUN Sunbang
Subang Jaya

2 Pengarah
Tanjung Istimewa Sdn Bhd

A 3 Petaling Tanah Petaling

4 KPPD(T)

The meeting on 5 February 1999 referred to in the letter was held at the request of the applicants. It was at this meeting that the respondent agreed not to enforce the eviction notices until after 5 March 1999. The B respondent clearly stated in his letter that the said decision was only applicable to the squatters represented by the first applicant. The letter made no mention on the fate of the other squatters, who form the majority of the squatters in KSN.

C *The background*

The applicants were squatters on state lands. They had been residing illegally and without permission on the state lands, in an area what is now known as Kampung Sg Nipah, District of Petaling, Selangor, along with some other squatters for the past 40 years. According to the survey conducted by the Petaling District Office on 21 and 22 December 1996, D there were 132 squatter families residing in KSN. They had constructed houses and/or structures on the state lands without the permission of the state authority. In addition to this, there were another 55 families who were either relatives of some of the 132 squatter families or tenants. A complete list of the squatter families certified by the village head is exhibited as exh E AM3 in the respondent's affidavit. The actual number of persons residing in the KSN was not made known to the court.

The applicants claimed that when they initially resided in KSN it was then a forest area and a burial ground. They alleged that Mr Michael Chen, who was then the member of Parliament for Bukit Raja had promised them that he would obtain the land approval from the state authority on their F behalf.

At present there are about 200 families, including the applicants herein, residing in KSN. The applicants claimed that the government had provided basic amenities such as water, electricity, telephone, roads and community hall (Balai Raya) for the use of the villagers. By providing such amenities the G government had impliedly given recognition to KSN and allowed the residents to reside therein.

Sometime in February 1997, the respondent issued eviction notices to them to vacate their houses within 14 days. The respondent agreed to defer any further action after the applicants sought the assistance of Mr Lee Hwa H Beng, who was the state assemblyman for Subang Jaya. Subsequently, the applicants discovered that the lands they had been residing had been approved for alienation to Tanjung Istimewa Sdn Bhd ('TISB'). TISB had entered into an agreement with Million Horizon Development Sdn Bhd ('MHSB') for development of the land into shophouses and service apartments. Several meetings were then held between the residents of KSN I including the applicants, TISB, MHSB and the state assemblyman for the constituency and some other politicians. This culminated in an offer from TISB and MHSB to all the residents, including the applicants for

compensation and purchase of low cost flats. The terms of the offer were contained in the letter of acceptance which is reproduced below:

To: Tanjung Istimewa Sdn Bhd
Million Horizon Development Sdn Bhd
No 15 Jalan USJ 10/1E
47620 Subang Jaya
Selangor Darul Ehsan

From: Name:
IC No:
House No:
Date:

Penduduk Rumah Setinggan Di Kampung Sungai Nipah
Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan

With reference to the above captioned, I am pleased to confirm that the following conditions of eviction of my squatter house have been understood and accepted by us:

Option A (Owner)

Sagu hati of RM9,000 without the allocation of one (1) [ ]
Unit of long house and an offer to sell one (1) unit of low cost flat to me.

OR

Option B (Owner)

Sagu hati of RM2,500 with the allocation of one (1) unit of [ ]
long house and an offer to sell one(1) unit of low cost flat to me.

OR

Option C (Extended Family/Tenant)

An offer to sell one (1) unit of low cost flat to me [ ]

Thank you,
Yours faithfully,

Name:

IC:

The applicants understood and believed that the low cost flats offered to them would be situated in Bukit Jelutong, in the vicinity of the Shah Alam Stadium and not in Bukit Subang area in Sg Buloh, as it turned out to be. It was on that understanding that they accepted the offer and opted for either Option A or Option B. Deposits for the low cost flats were paid. They did not however signed the sale and purchase agreements for reasons not disclosed to the court. There was also a feeling of dissatisfaction among those who were not eligible for Option A or B as they were only offered the purchase of low cost flats without any compensation.

A The applicants withdrew their acceptance of the said offers when they discovered that the low cost flats would be sited in Kampung Subang in Sg Buloh and not in Bukit Jelutong. They felt cheated and lodged police reports against the state assemblyman for Subang Jaya. The majority of the squatters in KSN had either opted for Option A and vacated the lands or opted for Option B and stayed in the long houses pending the completion B of the low cost flats.

On 13 January 1999, the respondent issued fresh eviction notices to all the squatters in KSN to vacate the state lands within 14 days of the date of the notices. On 22 January 1999 a meeting was held between the respondent and the applicants at the request of the latter. As a result of this C meeting the respondent promised not to take any further action pending the next meeting.

The next meeting was on 5 February 1999. It was attended by the first applicant and 15 other applicants. It was at this meeting that the applicants requested for deferment of the enforcement of the eviction notices. The D respondent agreed to defer any further action until after 5 March 1999. It was this very decision and not the eviction notices that the applicants now seek to quash by an order of certiorari.

Grounds of application

E The applicants sought to quash the decision of the respondent as being null and void on the following grounds: unreasonableness, discrimination, locus standi, ultra vires and mala fide. The grounds were either stated in their statement made pursuant to O 53 r 1(2) of the Rules of the High Court 1980 or in their supporting affidavit. At the hearing before me the learned counsel for the applicants did not pursue with the grounds in respect of ultra F vires and mala fide and conceded in the course of his submission, as we shall see later, that the respondent had the locus standi to make the impugned decision.

Unreasonableness

G It was submitted that the respondent's decision was unreasonable and irrational because the respondent's decision was only directed at them and not to all the residents of KSN. They claimed that they had to vacate the lands and that their houses would be demolished after 5 March 1999 while the other residents who were also squatters were allowed to stay in KSN without their houses being demolished. The learned counsel contended that H the applicants were under such impression or belief because the respondent's letter was vague and unclear. Further the one month's period to vacate was inadequate as it would be difficult for the applicants to find alternative accommodation.

The learned counsel referred to *R Rama Chandran v The Industrial* I *Court of Malaysia & Anor* [1997] 1 MLJ 145 as an authority that the court could review the respondent's decision not only on the grounds of procedural impropriety but also on the ground of illegality and irrationality.

Edgar Joseph Jr FCJ, in his majority judgment in that case cited Lord Diplock's judgment in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374 on the meaning of 'irrationality' and 'illegality'. Lord Diplock, at pp 410–411 said:

> By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exerciseable.
>
> By 'irrationality', I mean what can now be succintly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ... 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review'.

The respondent, in his affidavit in reply stated that the eviction notices had been issued to all the squatters in KSN on 19 September 1996, 12 March 1997, 20 September 1997 and finally on 13 January 1999. The applicants did not deny these facts. Despite those notices they refused to vacate the lands. The learned counsel for the respondent pointed out that the respondent's letter (exh TM1) was addressed to the applicants only and not to all the residents of KSN because the meeting was made at the applicants' request and it was them who requested for the deferment of the enforcement of the eviction notices. The respondent acceded to their request. How could the respondent's decision be considered as unreasonable or irrational? The letter itself was clear and not vague. It stated that:

> ... Pegawai Daerah Petaling telah bersetuju untuk menangguhkan tindakan meroboh/mengosongkan rumah bangunan setinggan yang tuan wakili sahaja untuk tempoh satu bulan iaitu sehingga pada 5 Mac 1999.

Their delay tactics, as submitted by the counsel for the respondent was merely to gain a leverage and an attempt through the backdoor to get a higher compensation. The offers of compensation and purchase of low cost flats were done on compassionate and humanitarian grounds. Indeed the learned counsel for the applicants conceded that strictly in law, the respondent was under no obligation to provide alternative accommodation.

I am of the view that the letter was clear and unambiguous. The applicants could not be misled by it. The word, 'sahaja' in the letter means that the extension was given to them alone and not to the other squatters. They requested for the postponement and they got what they wanted. There was no evidence before me that they asked for a longer period or that the eviction notices be revoked. Nor was there any evidence that they had appealed to the respondent for a further extension beyond 5 March 1999 upon receipt of the respondent's decision. The letter did not state anywhere that the other squatters need not have to vacate the lands or that their houses would not be demolished. With respect, the learned counsel for the

A applicants was trying to interpret the letter by putting words which were not there to bolster his clients' case. I am unable to see how the respondent's decision to defer enforcement of the eviction notices, made in favour of the applicants, arising directly from their own request could be said as irrational and unreasonable.

B 'Illegality' as a ground for judicial review was not canvassed before me.

Discrimination

The argument was again centred on the meaning which the applicant ascribed to the respondent's letter. They claimed that they had been discriminated because the respondent's decision in his letter (exh TM 1) C was directed only to them and not to all the squatters of KSN. As such the other squatters need not have to vacate the lands or that their houses would not be demolished after 5 March 1999. The learned counsel for the applicants even ventured to suggest that Tanjung Istimewa Sdn Bhd (TISB) to whom the lands were approved for alienation but had defaulted D in payment of quit rents and premiums and MHSB, the developer who had advertised and constructed long houses on the lands were also trespassers. Being trespassers, they should also be issued with eviction notices and treated similarly and not differently or favourably. Such discrimination violates art 8(1) of the Constitution which provides that all persons are equal before the law and are entitled to equal protection of the law. He cited E *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241 as authority in respect of art 8 of the Constitution. The Court of Appeal in that case, in interpreting art 8 of the Constitution followed *PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166 where the Federal Court said at p 254:

F > The principle underlying art 8 is that the law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it must be general in character and universal in application and that the state is no longer to have the power of distinguishing and classifying persons for the purpose of legislation ...
>
> All that the article guarantees is that a person in one class should be G treated the same as another person of the same class ...

The respondent, in his affidavit in reply deposed that the eviction notices dated 13 January 1999 had been issued to all the squatters of KSN and not to the applicants alone. To prove his point he exhibited 178 eviction notices dated 13 January 1999 (exh SN-3) issued to all the squatters of KSN. That H these notices were issued to all the squatters were not disputed by the applicants in their affidavit nor by their counsel at the hearing before me.

I found, on the facts before me that there was no discrimination within the meaning of art 8(1) of the Constitution. The applicants and the other squatters were treated similarly and not differently. In fact they were better treated compared to the other squatters, who form the majority of the I squatters in KSN. The respondent had been fair to the applicants. He heard them and acceded to their request for an extension of time. As far as TISB and MHSB were concerned, they could not, by any stretch of imagination

be labelled as squatters and be put in the same class as the applicants. Nor were they trespassers. The long houses were constructed with the knowledge and permission of the state authority. Section 425 of the National Land Code makes it an offence only, if, among others, any person occupies, or erects any building on any state land without lawful authority.

Locus standi

The applicants contended that the respondent did not have the locus standi to make the impugned decision as the lands had been alienated to TISB. The learned counsel for the applicants conceded, quite rightly, that the lands remained state lands after reading the respondent's affidavit in reply. The respondent had in his affidavit in reply stated that the approval for alienation of the lands to TISB had lapsed as it had defaulted in payment of premiums, which was one of the conditions when the state authority approved the lands for alienation. Being state lands, the respondent had the locus standi to make the impugned decision.

Even assuming that the learned counsel had made no concession on the issue of locus standi I am of the firm view that the respondent had the locus standi to deal with state lands. In this case, the lands remained state lands as no title had been issued to TISB. At all material times, the lands had not been registered in the name of TISB. Section 78(3) of the National Land Code makes it clear that the alienation of state land shall take effect upon the registration of a register document of title and notwithstanding that its alienation had been approved by the state authority, the land shall remain state land until that time.

As far as the applicants are concerned, they have no right in law and equity over state lands. Section 48 of the National Land Code prescribes that no title to state land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever.

In *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & Ors/Lesco Development Corp Sdn Bhd v Yap Chong Lan & Ors* [1984] 2 MLJ 123. Abdoolcader FJ, after referring to ss 48 and 78(3) of the Code said at p 128:

> These statutory provisions by themselves would appear to provide a complete answer to and inhibit the interpolation of any equity in regard to the respondent's claim. There can be no intervention by equity in the face of the specific legislative provisions of the Code (*Pemungut Hasil Tanah, Kota Tinggi v UMBC* [1981] 2 MLJ 264).

In *Sidek bin Hj Muhamad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313 three hundred and seventy-seven squatters on state land sought for a declaration inter alia that they were entitled in law and equity to be in possession of their respective lots originally pioneered, opened up and occupied by them. Their action was struck off by the High Court under O 18 r 19 of the High Court Rules on the application by the defendants. The Federal Court dismissed their appeal and said (at p 314):

> 'What equitable right or interest can be conjured up for the squatters who have illegally occupied State land? Squatters go into possession by, or as

A a result of, illegal occupation of State land. Illegal occupation of state land is an offence under s 425 of the National Land Code. It is well established that a court of equity will never assist squatters to resist an order of possession illegally acquired; it will never intervene in aid of wrongdoers (see *Grafton v Griffin* 39 ER 130). We would like to say this at once about squatters. The owner is not obliged to go to the court to obtain an order
B of possession. He is entitled, if he so wishes, to take remedy into his own lands. He can go in himself and turn them out without the aid of the courts of law. He can even use force, so long as he uses no more force than is reasonably necessary. He will not then be liable either criminally or civilly. This however is not to be encouraged because of the disturbance which might follow but the legality of it is beyond question.'

C The respondent's powers to deal with state lands are spelt out in s 15 of the Code. Section 15(1) of the Code states that the state directory, the registrar and any land administrator may for the purposes of this Act:

(a) at all reasonable times have free access to, and enter upon any land in the State;

D (g) exercise all other powers conferred on him by this Act, and all such powers ancillary or incidental thereto as may be reasonably necessary to carry out the purpose of this Act.

Section 425 of the Code makes it an offence for any person, who without lawful authority, occupies, or erects any building on, any state land,
E reserved land or mining land. Section 426A of the Code empowers the land administrator without warrant, to arrest any person found committing or attempting to commit or abetting the commission of an offence under s 425 or s 426 and to demolish, destroy or remove any building or take possession in the name of the state authority of any crop, erected or cultivated on any
F land in contravention thereof.

So, when the respondent issued the eviction notices and made the impugned decision he was merely exercising his powers under s 15, in particular s 15(1)(g) as the applicants had occupied the state lands and erected houses thereon illegally and without permission.

G *Is certiorari a proper remedy?*

The learned counsel for the respondent submitted that an order of certiorari is not normally issued where the applicants have an alternative remedy save only in very exceptional circumstances: See *Re Low See Kim* [1988] 3 MLJ 110, *Lim Kui Siam & Anor (representing member of Persatuan*
H *Penduduk-Penduduk Kawasan Hj Manan, Kluang) lwn Pentadbir Tanah Daerah Kluang* [1995] 1 CLJ 846, *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41, *Kuluwante (an infant) v Government of Malaysia & Anor* [1978] 1 MLJ 92 and *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185.

I In the instant case, the applicants have a right of appeal against the decision of the respondent if they were aggrieved by the said decision. Section 418 of the Code provides:

(1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court. A

(2) ...

(3) In this section 'decision' includes any act, omission, refusal, direction or order. B

The respondent's decision was on 5 February 1999. The applicants filed his ex parte application for leave for an order of certiorari on 22 February 1999. The time for appeal had not lapsed.

In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, C the respondent applied for an order of certiorari to quash the notices of additional assessment for income tax for the years 1979 to 1984 inclusive. The High Court granted the respondent's application. The appellant's appealed against the decision. The issue posed to the court was whether certiorari would issue where there is an alternative remedy open to the respondent to appeal to the Special Commissioners of Income Tax under D the Income Tax Act. The Supreme Court in allowing the appeal said (p 186):

> The first principle to note is that certiorari is a discretionary remedy primarily concerned with the prevention of excess or abuse of power rather than the final determination of individual rights. The jurisdiction is sometimes referred E to as an 'extraordinary' original jurisdiction of the High Court, supervisory in character rather than appellate or revisionary (see Professor Jain's *Administrative Law of Malaysia and Singapore* at p 360).
>
> There is said to be a subsidiary rule to the effect that certiorari is not normally issued if the applicant has an alternative remedy available to him because the rationale is that he should first make use of the domestic remedy F provided for him instead of invoking the writ jurisdiction.

The Supreme Court, after referring to various authorities on this issue, then said at p 189:

> A clear principle is reiterated here i.e. it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial G review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.
>
> In *Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners H were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.

This case was followed by the High Court in *Re Low See Kim* [1988] 3 MLJ 110. Lamin J (as he then was) refused leave to apply for an order of certiorari and held that 'the remedy by way of judicial review is still a matter I of discretion for the High Court but it will be available in only exceptional circumstances'.

A Another case in point is *Lim Kui Siam & Anor v Pentadbir Tanah, Daerah Kluang*, where Low Hop Bing JC, as he then was, followed the decision in *Government of Malaysia & Anor v Jagdis Singh* and dismissed the applicants' application for leave to apply for an order of certiorari to quash the decision of the land administrator who had issued eviction notices to the applicants, who were squatters on state lands, on the ground that it was the B duty of the applicants to prove the existence of very exceptional circumstances in order to obtain leave from the court to issue certiorari.

The Court of Appeal in *Cheah Foong Chiew v Lembaga Jurutera Malaysia* [1999] 3 MLJ 110, followed *Government of Malaysia & Anor v Jagdis Singh* when it affirmed the decision of the High Court which C dismissed the appellant's application for a declaration, holding that as a matter of judicial policy, the normal rule is not for the court to intervene but to allow the domestic tribunal to proceed and decide on the matter. Further, the Court of Appeal said that the appellant's application was premature as he could appeal to the Appeal Board against the decision of the respondent.

D The learned counsel for the applicants replied that the existence of a statutory right of appeal did not preclude them from applying for an order of certiorari. He referred to the Court of Appeal's decision in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor and another appeal* [1998] 2 MLJ 289. In that case, the applicant applied for leave for an order E of certiorari to quash the Notice of Cancellation of Entry Permit issued by the Director of Immigration, Sabah. Sulaiman Hashim J granted the leave despite of the provision in s 14(5) of the Immigration Act ('the Act') allowing an aggrieved person to appeal to the Minister and another provision in s 59A of the Act which enacts that there shall be no judicial review in any court of law. Ian Chin J, who heard the substantive motion, F however dismissed the application for an order of certiorari, holding, inter alia, that the ouster clause in s 59A applied to acts done or decisions made by the Director of Immigration, Sabah. The applicant appealed. The Court of Appeal allowed the appeal and held, inter alia, that s 59A of the Act did not preclude the High Court from exercising its powers of judicial review to G examine the validity of the exercise of administrative powers conferred by the Act both on substantive as well as procedural grounds. An ouster clause in a statute, in any case, immunized from judicial review only those administrative acts and decisions that were not infected by an error of law.

There is no doubt that the court may, in appropriate cases, grant judicial review notwithstanding the availability of an independent remedy. H See for example *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sg Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 where the Federal Court has illustrated a variety of situations in which the courts had granted judicial review despite the existence of an appeal remedy.

It is often said that judicial review is concerned not with the decision I but the decision making process: See *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155. The law however does not remain static. The Court of Appeal in *Sugumar*'s case held, following the Federal Court's

decision in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, that judicial review was no longer only concerned with the decision making process but also with the decision itself. The duty to act fairly now comprises of two limbs, namely procedural fairness and substantive fairness. It follows that a decision may be struck down as being contrary to substantive principles. In referring to the facts of that case, Gopal Sri Ram JCA at p 300 said:

> In the circumstances of this case, the remedy of an appeal was for obvious reasons, certainly not equally efficacious as certiorari. The appellant was given a mere seven days to leave Sabah. The time afforded him was hardly sufficient for him to make arrangements in respect of the practice he had built up over many years. Serious injury to the appellant's livelihood was imminent. An appeal to the Minister would not have been decided upon within the seven day period afforded to the appellant. Further, the Act does not provide for a stay of a decision pending appeal to the Minister. It meant that the appellant would have to remove himself from the State of Sabah while awaiting the outcome of his appeal.

The learned counsel for the applicants submitted that the exceptional circumstances which existed in *Sugumar*'s case were similar to the circumstances in the instant case. The applicants applied for an order of certiorari instead of appealing because it would be more efficacious as an appeal would take a longer time to dispose of the matter. Further, there is no provision in the National Land Code for a stay of the respondent's decision. He did, however conceded before me that an application for a stay of the impugned decision could be made to the court immediately upon filing an appeal under s 418 of the Code. It is clear that O 53 r 1(5) of the Rules of the High Court does not provide for an automatic stay. Order 53 r 1(5) states that the grant of leave shall operate as a stay of the proceeding in question 'if the court or judge so directs'.

The learned counsel for the respondent submitted that on the facts of this case, there were no really exceptional circumstances to justify the court, in exercise of its discretion, to grant an order of certiorari to quash the respondent's decision. I agree. The applicants should have appealed against the respondent's decision under s 418 of the Code rather than resorting to judicial review in absence of very exceptional circumstances. Except for the fact that there is no provision for a stay of the respondent's decision in the Code, the rest of the facts in *Sugumar*'s case, are distinguishable. In *Sugumar*'s case, the notice of cancellation of the entry permit became effective as soon as it was served. The words used in the notice states, '... hereby forthwith cancel the entry permit issued to you ...' It was served on him on 12 December 1997. On the same day, he was issued with a special pass valid only for seven days, at the end of which he had to leave Sabah, giving him hardly sufficient time to make arrangement for his law practice. An appeal to the Minister would not have been decided upon within the seven day period. Such was the urgency of the situation in that case. In our case, the applicants were given sufficient time to vacate the state lands. First, they had 14 days to vacate the state lands from the date of the eviction notices. Upon their own request to the respondent, the applicants were later

given one month extension beginning from 5 February 1999 and expiring on 5 March 1999. The applicants had ample time to appeal to the High Court against the respondent's decision and thereupon, apply for a stay pending the outcome of the appeal. They were even offered compensation and an alternative accommodation pending the completion of low costs flats which they initially accepted, only to change their minds later because they preferred flats in Bukit Jelutong and not in Bukit Subang.

Another distinguishing fact is that the applicant in *Sugumar*'s case had entered Sabah legally whereas in our case, the applicants occupied the state lands illegal and without permission. As Raja Azlan Shah CJ in *Sidek bin Hj Muhamad & Ors v Government of the State of Perak* [1982] 1 MLJ 313 aptly said at p 314, '... squatters have no right either in law or in equity'.

The court is not unmindful of the views expressed in *Sugumar*'s case and *Majlis Perbandaran Pulau Pinang*'s case that the remedy of certiorari is more efficacious and speedier than that of an appeal, but in the circumstances of this case, bearing in mind that:

(i) the applicants had more than one month to appeal to the High Court after service of the eviction notices and thereupon to apply for a stay, if necessary;

(ii) the ex parte application for leave to apply for an order of certiorari was filed only on 22 February, 1999 ie about 11 days before the deadline set by the respondent;

(iii) the applicants were offered compensation and alternative accommodation and indeed accepted the offers, according to their own evidence, from their own affidavit but changed their minds later as they preferred to be in Bt Jelutong and not in Bt Subang Sg Buloh;

(iv) the applicants occupied state lands illegally; and

(v) a court of equity will not intervene in aid of wrongdoers;

The contention that the remedy by way of certiorari was more efficacious than by way of an appeal was not convincing enough and did not carry much weight.

The learned counsel for the respondent also contended that the applicants were guilty of non-disclosure of material or relevant facts when they applied for leave to issue an order of certiorari. This was denied by the applicants. I did not think that it was necessary for me to decide on this point in order to dispose of the applicant's application.

Before I conclude, I have one general observation to make. There is no hard and fast rule as at what stage the issue on the availability of an alternative remedy should be dealt with: see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sg Gelugor Dengan Tanggungan* but ideally it would be preferable if this issue is ventilated first before the parties proceed to other issues. Ordinarily the court is not in the best position to anticipate precisely in every case the issues that the parties may raise in the course of the hearing.

For reasons as stated above, I regretfully dismissed the applicants' application for an order of certiorari with costs. A

Application dismissed.

Reported by Jafisah Jaafar

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